No. 61316-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NOEL EVAN CALDELLIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas J. Wynne

BRIEF OF APPELLANT

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2. The trial court erred in refusing to suppress Mr. Caldellis's statements to the police.

3. To the extent it is determined to be a finding of fact, the trial court erred in entering CrR 3.5 Conclusion of Law 4.10 to the extent it finds Mr. Caldellis's statement "Would it help me to have a lawyer?" was not an equivocal or ambiguous request for an attorney.

4. To the extent it is determined to be a finding of fact, the trial court erred in entering CrR 3.5 Conclusion of Law 4.11 to the extent it finds that the decisions in *Davis v. United States,* 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed.2d 362 (1994), and *State v. Walker,* 129 Wn.App. 258, 118 P. 3d 935 (2005), controlled the outcome and foreclosed Mr. Caldellis's argument regarding his equivocal request for counsel.

5. The trial court erred in refusing to instruct the jury that Mr. Caldellis had no duty to retreat.

6. The trial court erred in refusing to give Defense Proposed Instruction 41, which stated:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the lawful use of force. The law does not impose a duty to retreat.

7. RCW 9A.32.030(1)(b), first degree murder by extreme indifference, is unconstitutionally vague as applied to Mr. Caldellis.

8. Entry of the conviction for first degree murder by extreme indifference violated Mr. Caldellis's Fourteenth Amendment right to equal protection.

9. There was insufficient evidence presented to support the jury's verdict of first degree murder based upon extreme indifference.

10. There was insufficient evidence presented to support the jury's verdict Mr. Caldellis committed assault in the second degree.

11. The prosecutor violated Mr. Caldellis's Fourteenth Amendment right to a fair trial by committing misconduct during closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person being interrogated by the police while in custody has the right to be silent and not answer any questions and the right to an attorney prior to any questioning. In Washington, where the person makes an equivocal request for an attorney, the police questioning is limited solely to clarifying whether the person wants an attorney. Mr. Caldellis made an equivocal request for counsel while in custody and being interrogated but the trial court refused to suppress the statement finding the police failure to clarify Mr. Caldellis's equivocal request for counsel did not violate *federal* law. Did the trial court err?

2. Where the trial court instructs the jury on self-defense, the court must instruct the jury the defendant had no duty to retreat. The trial court here instructed the jury on self-defense but refused to instruct the jury that Mr. Caldellis had no duty to retreat. Is Mr. Caldellis entitled to reversal of his conviction and remand for a new trial?

3. The vagueness doctrine of the Fourteenth Amendment due process clause requires a statute provide "sufficient definiteness" in order to prevent arbitrary enforcement. First degree murder by extreme indifference, which is defined as

"aggravated recklessness," fails to provide sufficient definiteness to the jury to distinguish it from first degree manslaughter, which requires reckless conduct, thus failing to prevent arbitrary application. Is first degree murder by extreme indifference vague as applied to Mr. Caldellis?

4. Equal protection guarantees of the Fourteenth Amendment and Article I, § 12 of the Washington Constitution require similarly situated people to receive similar treatment, and that disparate treatment of criminal defendants be justified by a rational basis. Mr. Caldellis was charged with first degree murder by extreme indifference for conduct which also could be charged as first degree manslaughter. Does RCW 9A.32.030(1)(b) violate equal protection as it allows prosecutors unfettered discretion whether to charge first degree murder as opposed to first degree manslaughter for the identical conduct?

5. Due Process under the Fourteenth Amendment requires the State prove every element of an offense beyond a reasonable doubt. Acting with extreme indifference to human life, defined by the trial court as "aggravated recklessness," was an element of first degree murder the State was required to prove. Where the State proved Mr. Caldellis acted recklessly when he shot the gun but

failed to prove he acted with aggravated recklessness, is Mr. Caldellis entitled to reversal of his first degree murder conviction?

6. Second degree assault under the reasonable apprehension prong requires the State prove the defendant acted with specific intent to create reasonable fear and apprehension of bodily injury in the victim. Here the State proved only that Mr. Caldellis fired the gun without targeting a specific individual, thus the two alleged victims of assault did not have a reasonable apprehension of bodily injury. Is Mr. Caldellis entitled to reversal and dismissal of the assault convictions?

7. The Sixth and Fourteenth Amendments guarantee an accused person a fair trial before an impartial jury. Where a prosecutor engages in misconduct during closing argument which misstates the law, the defendant is denied a fair trial. The prosecutor here stated that merely shooting into the air was sufficient to prove second degree assault, contrary to Washington law regarding assault. Is Mr. Caldellis entitled to a new trial where he was denied a fair trial based upon prosecutorial misconduct?

C. STATEMENT OF THE CASE

On Saturday night, September 2, 2006, 22 year old Dustin Black and his 20 year old sister, Amanda, decided to have a party at their house in Brier while their parents were away. RP 31-33, 138-39. One of the guests at this party was Jay Clements, a friend of Dustin Black's. RP 35, 141. Also in attendance at the party was 17 year old Cole Huppert. RP 773-74. Huppert had a long-simmering feud with Jason Kimura. RP 230.

At the same time as the Blacks' party, Kimura along with several friends, including appellant Noel Caldellis, were attending a birthday party in Lake City. RP 421-25. During the evening there were several telephone calls between Huppert, Kimura, and Roddy Ayers, who was also attending the party in Lake City. RP 230-35. At some point there was an agreement made between Kimura and Huppert to fight at an undisclosed location. RP 234. Several of the people at the Lake City party agreed to assist Kimura and a few agreed to join in the fight. RP 236. Approximately 12 people left the Lake City party in three cars to drive to a park and await further instructions. RP 240. Driving one of the cars was Mr. Caldellis, who along with Joshua Ong went along not to fight but merely to watch. RP 429, 502. The impression the young men had as they

drove to the fight was that it was merely a one-on-one fight between Huppert and Kimura. RP 501, 609, 1233, 1454.

The caravan of cars went first to a convenience store then a grocery store where they awaited directions from Huppert by telephone to the Blacks' residence. RP 431-33, 540-43. While milling around in the grocery store parking lot awaiting Huppert's telephone call, Hannan Kahn and another member of the group became involved in a heated argument with Kahn, pulling out a gun, waiving it at the other member and threatening to kill him. RP 433-34. In order to prevent further harm, Mr. Caldellis grabbed the gun from Kahn and tucked it into his waistband. RP 435, 440.

The Lake City group received directions from Huppert to the Blacks' party and the three cars proceeded to that location. RP 547. The cars stopped at a cul-de-sac in Brier where the Blacks' residence was located. RP 444. The group began walking towards the Black's house when a group of people came running out of the house shouting racial slurs and began fighting with the Lake City group. RP 449, 507-11, 890, 1219.[1] The Lake City group was outnumbered and began to retreat to their cars when Mr. Caldellis pulled the gun from his waistband. RP 258, 452. Mr. Caldellis fired

[1] Several of the Lake City group were young Asian males and a few were African-American.

two shots into the air, and then fired two shots towards an open access area where the majority of the fighting was occurring. RP 453-55. The Lake City group got into their cars and returned to where they had started. RP 260-61, 454, 463.

The two shots Mr. Caldellis fired towards the crowd of people struck Jay Clements, killing him. RP 1856-65. As a result of the ensuing police investigation, Mr. Caldellis was arrested and charged with first degree murder by extreme indifference to human life, second degree felony murder, and two counts of first degree assault. CP 339-40.

At the close of the State's evidence, the trial court granted Mr. Caldellis's motion to dismiss the felony murder count for a lack of evidence. RP 2729. The court also reduced the assault charges to second degree, again for a lack of evidence. RP 2729. The jury convicted Mr. Caldellis of these remaining counts. CP 72-77.

D. ARGUMENT

1. THE POLICE FAILED TO TERMINATE QUESTIONING AFTER MR. CALDELLIS'S EQUIVOCAL REQUEST FOR COUNSEL IN ORDER TO CLARIFY HIS REQUEST, THUS HIS RESULTING STATEMENTS WERE INADMISSIBLE AT TRIAL

Mr. Caldellis was arrested at his place of employment on September 4, 2006. 5/4/07RP 3-6. Mr. Caldellis was initially advised of his right to remain silent at that time. 5/4/07RP 7. Mr. Caldellis agreed to waive those rights and speak with the officers. 5/4/07RP 7. There was some initial questioning about the incident at the party in Brier and, after Mr. Caldellis admitted shooting, the location of the handgun. 5/4/07RP 27-30. Mr. Caldellis also agreed to give a videotaped statement. 5/4/07RP 30.

During the videotaped statement, Mr. Caldellis was again advised of his right to silence and he again waived that right and agreed to speak to the detectives. 5/4/07RP 31. At one point in the interrogation, the following exchange occurred between Mr. Caldellis and Detective Rittgarn of the Lynwood Police:

> N. Caldellis: Wait, actually, would it help me to have a lawyer? I mean . .
>
> Det. Rittgarn: Well, I mean we already talked. We talked in the back of the car or on the . . . trip up here and um, we went over pretty much everything.

N. Caldellis: Yeah.

Det. Rittgarn: Uh, that's something . . . you know I can't give you uh, advice on . . . on what to do. I mean I can't give you any legal advice. Uh, that's something you need to decide for yourself. Um, you've already . . .

N. Caldellis: At least . . .

Det. Rittgarn: You've already admitted to me that . . . that you did . . . you know you did the shooting. You had the gun and you brought it to the party and uh, you ended up shooting the guy at the . . . at the party. Um, so we're just kind of . . .

N. Caldellis: I'm just curious . . .

Det. Rittgarn: . . . getting it . . . getting your words . . .

N. Caldellis: . . . like from experience with the . . . like I said it was with the DUI thing . . .

Det. Rittgarn: Uh huh.

N. Caldellis: . . . if I had a lawyer I would have been . .

Det. Rittgarn: Well you . . . you
. . .
N. Caldellis: But, I'm just saying for . . . from experience with that like if I had a lawyer it would have been better I just think. That's all I'm asking like it . . .

Det. Rittgarn: Well, it's uh . . . You know like I said I . . . I can't give you . . . I can't give you advice on . . . on what to do. I mean you've already admitted to me that . . . that you did uh . . . you did shoot the gun and . . . and it . . . and it did hit the guy and unfortunately he's uh . . . he's deceased now. Um, kind of

> unfortunate uh, happening. Uh, we just want to get your words down on paper uh, the . . . you know kind of show your . . . showing your side of the story.

CP Supp ___, Sub No. 166, Ex 167 at 3-4. Mr. Caldellis continued to ponder his option and the detective then changed the focus and questioned him about whether the police had mistreated him. Ex 167 at 5. Mr. Caldellis answered that the police had not mistreated him, which effectively changed the direction of the interrogation back to the circumstances of the shooting. Ex 167 at 5-6. Mr. Caldellis did not raise the specter of an attorney again during the interrogation.

Prior to trial, the court held a hearing pursuant to CrR 3.5 to determine the admissibility of Mr. Caldellis's statement. Regarding the issue of Mr. Caldellis's question about counsel during the interrogation, the court ruled his request was equivocal and the police were not required to clarify the matter. CP 317-18. The court relied upon the decisions in *Davis v. United States,* 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed.2d 362 (1994), and *State v. Walker,* 129 Wn.App. 258, 118 P. 3d 935 (2005), in reaching its conclusion. CP 318. The court ruled Mr. Caldellis validly waived his right to silence and right to counsel and found the statements

admissible at trial. CP 318. The entire videotaped interrogation was admitted at trial and played for the jury. RP 2628.

a. The police must cease all questioning when a defendant makes a request for an attorney during custodial interrogation. Under the Fifth and Fourteenth Amendments to the United States Constitution, the police must advise a suspect of his right to have an attorney present during custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436, 469-73, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Before any statement that is a product of custodial interrogation may be admitted at trial against a defendant, the State must prove that the defendant knowingly and intelligently waived his right to remain silent. *Id.* at 467. If, after being apprised of his *Miranda* rights, a suspect requests counsel at any time during an interview, questioning must stop until a lawyer has been made available or the suspect himself reinitiates conversation. *Davis*, 512 U.S. at 458; *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). If the request is equivocal, the officer must limit questioning to clarify whether the accused intends to exercise his right to an attorney. *State v. Robtoy*, 98 Wn.2d 30, 38-39, 653 P.2d 284 (1982). If, after clarification, the suspect waives his right to counsel, questioning may resume. *Id.* In determining

whether an accused has made an equivocal request for an attorney, the court uses an objective standard, i.e., whether “a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis*, 512 U.S. at 459. However, in order to invoke that right, a suspect must make an unequivocal and unambiguous request for counsel. *Davis,* 512 U.S. at 459.

Whether a defendant's invocation of his right to counsel is equivocal is a question of law to be reviewed *de novo* on appeal. *State v. Aronhalt*, 99 Wn.App. 302, 307, 994 P.2d 248 (2000); *State v. Smith*, 34 Wn.App. 405, 408, 661 P.2d 1001 (1983).

b. Mr. Caldellis made an equivocal request for counsel. The trial court found Mr. Caldellis statement, or request, to the police to be neither an equivocal nor an ambiguous request for counsel. CP 317. The court’s finding was erroneous.

In determining whether a statement is an equivocal request for counsel, this Court has stated: “The essence of an "equivocal request," therefore, is that without further clarification it is impossible to determine whether a request has been made.” *State v. Smith,* 34 Wn.App. 405, 408, 661 P.2d 1001, review denied, 100

Wn.2d 1008 (1983). In *Smith* the defendant asked the police during the interrogation whether he needed an attorney. *Id.*

In *State v. Radcliffe*, the following statement was determined to be an equivocal and ambiguous request for counsel:

> When Miller said that he would get a tape recorder to record Radcliffe's story, Radcliffe responded that he did not know how much trouble he was in and did not know if he needed a lawyer. Miller said that he could not give any legal advice, but he again offered to read Radcliffe his rights. Radcliffe said that he knew what his rights were and he did not need Miller to read them again.

139 Wn.App. 214, 218-19,159 Wn.2d 486 (2007), *review granted,* 163 Wn.2d 1021 (2008).

There is no discernible difference between Mr. Caldellis's statement to Detective Rittgarn and the defendants' statements in *Radcliffe* and *Smith*. Thus, the trial court erred in concluding Mr. Caldellis's statement was neither an equivocal nor an ambiguous request for an attorney.

On appeal, this Court's review is limited to whether or not substantial evidence supports the findings of fact and in turn whether or not the findings of fact support the conclusions of law. *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 82, 701 P.2d 1114 (1985); *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638

P.2d 1231 (1982). "'Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.'" *Nichols*, 104 Wn.2d at 82, *quoting Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). "When a finding of the trial court is unsupported by substantial evidence, the finding is not binding on the appellate court." *Truck Ins. Exchange v. Merrell*, 23 Wn.App. 181, 184, 596 P.2d 1334, *review denied*, 92 Wn.2d 1035 (1979).

Here the trial court's finding is not supported by substantial evidence and is erroneous as a matter of law. This Court should reject the trial court's finding and instead find Mr. Caldellis's statement to be an equivocal request for counsel.

c. Under decisions of the Washington Supreme Court, an equivocal request for counsel requires cessation of questioning in order to clarify the request. In *Davis*, the Supreme Court addressed the issue of equivocal invocation and concluded that after a knowing and voluntary waiver of Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney:

> [W]hen a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he

> actually wants an attorney. . . But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

Davis, 512 U.S. at 461-62.

In *State v. Walker*, this Court adopted the *Davis* holding, ruling that

> [W]here a suspect has received Miranda warnings the invocation of the right to remain silent must be clear and unequivocal (whether through silence or articulation) in order to be effectual; if the invocation is not clear and unequivocal, the authorities are under no obligation to stop and ask clarifying questions but may continue with the interview.

129 Wn.App. at 276.

However, in 1982, the Washington Supreme Court adopted a rule requiring that "[a]ny questioning after the equivocal assertion of the right to counsel must be strictly confined to clarifying the suspect's request." *State v. Robtoy*, 98 Wn.2d 30, 39, 653 P.2d 284 (1982), *citing Edwards v. Arizona*, 451 U.S. 477, 486 n.9, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

> [W]henever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. *Further questioning thereafter must be limited to clarifying* that request until it *is* clarified.

Robtoy, 98 Wn.2d at 39, *quoting Thompson v. Wainwright*, 601 F.2d 768, 771 (5th Cir. 1979) (emphasis in *Robtoy*).[2]

A majority of the Washington Supreme Court has not addressed whether *Robtoy* survived after *Davis*. In *State v. Aten,* 130 Wn.2d 640, 927 P.2d 210 (1996), a plurality of four justices of the Supreme Court, after concluding that the State did not present sufficient evidence to establish the *corpus delicti* of the crime, applied *Robtoy* without discussing *Davis* and concluded that the defendant's statements made after an equivocal request for counsel were admissible because the defendant had initiated further communication. *Aten*, 130 Wn.2d at 662, 665-66 (plurality). Four concurring justices reasoned that, in light of the conclusion that the State had not established the *corpus delicti*, it was unnecessary to discuss any further issues. *Aten,* 130 Wn.2d at 668 (Madsen, J., concurring). But the concurrence questioned the plurality's reliance on *Robtoy* in light of *Davis*. *Aten,* 130 Wn.2d at 669 (Madsen, J., concurring).

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[2] The Court's holding in *Robtoy* was rooted in the Fifth and Fourteenth Amendments but the outcome would have been the same under the Washington Constitution. Article I, section 9 of the Washington Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." The Washington Supreme Court has held that the protection of Article I, section 9 is coextensive with that of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

Most recently, Division Two of this Court held that *Davis*, not *Robtoy*, is the controlling authority on how *Miranda* applies to a suspect's equivocal request for an attorney. *Radcliffe*, 139 Wn.App. at 224.[3]

d. The police failed to terminate questioning and failed to clarify Mr. Caldellis's request for counsel during the custodial interrogation. Mr. Caldellis did not make an unequivocal request for an attorney, but his equivocal request triggered the requirement in Washington that the police cease questioning except that designed to clarify the request. Detective Rittgarn plainly did not adhere to this requirement.

Detective Rittgarn's subsequent comments to Mr. Caldellis were not designed to clarify his request but rather to deflect the questions and steer the focus back to the interrogation. The detective's manner was clearly contrary to the requirements of *Robtoy*. The detective's choice following Mr. Caldellis's question was to either cease the interrogation or question Mr. Caldellis solely to clarify his request. The detective chose neither route and as a

[3] Oral argument in *Radcliffe* was conducted in the Supreme Court on June 26, 2008. A decision had not been rendered at the time of the filing of this brief.

result, the detective violated Mr. Caldellis's rights under *Miranda.* This Court should find Mr. Caldellis's statement inadmissible.

2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO INSTRUCT THE JURY THAT MR. CALDELLIS HAD NO DUTY TO RETREAT

Mr. Caldellis proposed and the trial court agreed to instruct the jury on self-defense regarding the two assault counts, but the court refused to instruct using Mr. Caldellis's proposed instruction that he had no duty to retreat. RP 3164. Mr. Caldellis objected to the court's refusal and the court determined:

> Well, [WPIC] 17.05 [no duty to retreat instruction] is based on the *State v. Allery* case. In the *State v. Allery* case, Mrs. Allery was in her home and had experienced assaults previously from her husband. This is basically a battered wife case. She came into the home, it was night, thought the husband wasn't there. He was there on the couch. He said, I guess I'm just going to have to kill you. He had a knife. There was a prior history of being assaulted with knives, and she shot him with a shotgun. They were both in the family home with a locked door.
>
> I think the facts of this case are substantially different, and this is not the *Allery* case, and I elected not to give this instruction. This is factually distinguishable.

RP 3164.

a. A person has no duty to retreat from a place where they are lawfully present. The law is well settled that a person assaulted in a place where he or she has a right to be has no duty to retreat. *State v. Allery,* 101 Wn.2d 591, 682 P.2d 312 (1984). A "no duty to retreat" instruction is appropriate where a defendant is assaulted in a place where he is lawfully entitled to remain, and where the jury could conclude from the objective facts that flight would have been a reasonably effective alternative to the use of force. *State v. Redmond*, 150 Wn.2d 489, 493-95, 78 P.3d 1001 (2003); *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). "Flight, however reasonable an alternative to violence, is not required." *State v. Williams*, 81 Wn.App. 738, 743-44, 916 P.2d 445 (1996). The trial court should instruct the jury on this legal principle when there is sufficient evidence to support giving it. *Allery*, 101 Wn.2d at 598. The no duty to retreat instruction also must be given where the instruction is necessary for the defendant to argue his theory of the case. *Id.*

This Court reviews a trial court's refusal to give a requested jury instruction *de novo* where the refusal is based on a ruling of law. *State v. White*, 137 Wn.App. 227, 230, 152 P.3d 364 (2007), *citing State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

Where the court's refusal to give a requested instruction was based on factual reasons, it is reviewed for an abuse of discretion. *White*, 137 Wn.App. at 230, *citing Walker*, 136 Wn.2d at 771-72. A proposed instruction is appropriate if it properly states the law, is not misleading, and allows a party to argue a theory of the case that is supported by the evidence. *Redmond,* 150 Wn.2d at 493.

The trial court here refused to give the no duty to retreat instruction requested by Mr. Caldellis and not opposed by the State, finding that Mr. Caldellis was not a battered spouse being attacked while inside his home by someone who had assaulted him on previous occasions, under the facts as stated in the decision in *State v. Allery,* 101 Wn.2d 591, 682 P.2d 312 (1984). RP 3164. The trial court later denied the motion for a new trial based upon the failure to instruct on no duty to retreat on the same grounds and on the ground that the evidence of self-defense was weak. 1/9/08RP 46-50. Mr. Caldellis contends the trial court was required to give the requested instruction as the evidence supported giving the instruction and was necessary for him to argue his theory of the case. The omission was reversible error.

b. Mr. Caldellis is entitled to reversal of his conviction and remand for a new trial. Failure to provide a no-duty-to-retreat instruction is reversible error when the facts warrant such an instruction. *Redmond,* 150 Wn.2d at 494.

In *Redmond*, the trial court reluctantly gave a self-defense instruction but refused to give a no duty to retreat instruction. The Supreme Court in reversing noted:

> At trial, the judge noted that he felt this was "barely a case . . . even entitled to a self-defense instruction." [citation to trial record omitted.] Be that as it may, the no duty to retreat instruction is required where, as in this case, a jury may objectively conclude flight is a reasonably effective alternative to the use of force in self-defense. The trial court cannot allow the defendant to put forth a theory of self-defense, yet refuse to provide corresponding jury instructions that are supported by the evidence in the case . . . Failure to provide such instructions constitutes prejudicial error.

Redmond, 150 Wn.2d at 495.

Here the trial court instructed the jury on self-defense but refused to give the no duty to retreat instruction. CP 98, 100-02. In two decisions from this Court, *State v. Williams* and *State v. Wooten*, the trial courts committed reversible error in refusing to give a "no duty to retreat" instruction in situations where the jury could conclude from the evidence that flight was a reasonably

effective alternative to the use of force in self-defense. *State v. Wooten,* 87 Wn.App. 821, 826, 945 P.2d 1144 (1997), *review denied,* 134 Wn.2d 1021 (1998); *State v. Williams,* 81 Wn.App. 738, 743-44, 916 P.2d 445 (1996). In *Williams*, the error was considered unduly prejudicial because the jury could have concluded that defendants' failure to retreat constituted an excessive use of force that precluded a finding of self-defense. *Williams,* 81 Wn. App. at 744. Similarly, in *Wooten* the court held the error could not be harmless because a reasonable juror could have concluded that flight was a reasonable alternative to use of force precluding a finding of self-defense. *Wooten,* 87 Wn. App. at 826.

Here the jury could have easily concluded Mr. Caldellis should have fled as opposed to shooting. The State seized upon the trial court's omission in its closing argument, noting that during the police interview of Mr. Caldellis

> [the police] asked him *why he didn't leave*. This is something you got to watch for on the video or the transcript. *Why didn't you leave*? His answer is: "We were there to fight."

RP 3185 (emphasis added). The prosecutor plainly planted the seed with the jury that Mr. Caldellis could have retreated, yet the

jury was never instructed by the trial court that Mr. Caldellis had no duty to retreat. Given the court's failure and the State's push for the unfair advantage, the no duty to retreat instruction was required. *Redmond,* 150 Wn.2d at 495.

Further, it was Mr. Caldellis's theory that he was required to fire the gun to defend himself and his friends during the fight in front of the Blacks' residence. The failure to give his proposed no duty to retreat instruction denied him the opportunity to argue that theory to the jury. The trial court's omission requires reversal of Mr. Caldellis's convictions.

3. FIRST DEGREE MURDER BY EXTREME INDIFFERENCE AS APPLIED TO MR. CALDELLIS WAS UNCONSTITUTIONALLY VAGUE THUS VIOLATING HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

a. Statutes must be sufficiently definite to protect against arbitrary enforcement. The vagueness doctrine of the due process clause of the Fourteenth Amendment requires a statute provide "sufficient definiteness" such that persons of common intelligence need not guess at the statute's meaning and to discourage arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983). A statute is

unconstitutionally vague if it either fails to define the offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed, or does not provide ascertainable standards in order to prevent arbitrary enforcement. *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001), *quoting City of Bellevue v. Lorang*, 140 Wn.2d 19, 30, 992 P.2d 496 (2000). "[T]he more important aspect of the vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 357-58 (Internal quotation marks omitted.). A statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973).

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). A criminal statute that "leaves judges and jurors to decide, without any legally fixed standards, what is prohibited and what is not in each particular

case," violates due process. *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

Construction of a statute is a question of law, which is reviewed *de novo* under the error of law standard. *City of Pasco v. Pub. Employees Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). The party asserting a vagueness challenge bears the burden of proving the statute's unconstitutionality beyond a reasonable doubt. *City of Spokane v. Douglass*, 115 Wn.2d 171, 177, 795 P.2d 693 (1990). When a challenged statute does not involve First Amendment rights, the statute is evaluated for vagueness, "as applied," in light of the particular facts of the case. *United States v. Powell,* 423 U.S. 87, 92-93, 96 S.Ct. 316, 319-20, 46 L.Ed.2d 228 (1975); *State v. Sullivan*, 143 Wn.2d 162, 181, 19 P.3d 1012 (2001).

b. RCW 9A.32.030(1)(b) lacked any standards to distinguish for the jury the difference between "extreme indifference" and "recklessness." The failure to distinguish for the jury the difference between "aggravated recklessness" as defined in the jury instructions regarding murder by extreme indifference and "recklessness" in the manslaughter jury instruction, renders RCW 9A.32.030(1)(b) unconstitutionally vague.

The failure to properly define material terms of a statute can render a statute void for vagueness. *City of Spokane v. Neff,* 152 Wn.2d 85, 89, 93 P.3d 158 (2001). A statute does not supply adequate standards if it "proscribes conduct by resort to "'inherently subjective terms'" or invites an inordinate amount of police discretion. *Douglass*, 115 Wn.2d at 181, *quoting State v. Maciolek*, 101 Wn.2d 259, 267, 676 P.2d 996 (1984).

> Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender, 461 U.S. at 358, *quoting Goguen*, 415 U.S. at 575.

In *State v. Dunbar,* 117 Wn.2d 587, 817 P.2d 1360 (1991), the Washington Supreme Court attempted to distinguish between manslaughter and murder by extreme indifference:

> first degree murder by creation of a grave risk of death (now amended to extreme indifference) requires more than ordinary recklessness . . . we interpret RCW 9A.32.030(1)(b) to require an aggravated or extreme form of recklessness which sets the crime apart from first degree manslaughter.

Dunbar, 117 Wn.2d at 594. But, the Court admitted that "the boundary (between manslaughter and murder) was not exact." *Id.*

In attempting to define "extreme indifference" for the jury, the trial court here instructed the jury:

> Conduct which creates a grave risk of death under circumstances manifesting an extreme indifference to human life means an *aggravated recklessness* which creates a very high risk greater than that involved in recklessness.

CP 85 (italics added).

In defining "recklessness," the trial court instructed the jury:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP 88.

Thus, the terms "aggravated recklessness" and recklessness as applied to Mr. Caldellis's conduct here failed to provide any meaningful guidance to the jury and failed to prevent arbitrary enforcement by the jury. One person's view of reckless conduct may be another person's aggravated recklessness. As a result, one juror may view Mr. Caldellis's conduct as merely reckless while another may view it as showing an extreme indifference to human life in light of the inability to adequately define these terms. Further, extreme indifference is defined as a "grave risk" of harm while the

recklessness required for manslaughter is defined as "substantial risk." Again the two terms are inherently subjective terms and invite an inordinate amount of juror discretion, which renders the statute unconstitutionally vague. *Goguen*, 415 U.S. at 576 ("Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.").

It may be argued that the decision in *State v. Pastrana* is dispostive of this issue as Division Two of this Court in *Pastrana* determined RCW 9A.32.030(1)(b) was not unconstitutionally vague. *State v. Pastrana,* 94 Wn.App. 463, 473-76, 972 P.2d 557, *review denied,* 138 Wn.2d 1007 (1999). But *Pastrana* only decided the vagueness of the statute on the first prong of the vagueness test, whether the statute gave fair warning of proscribed conduct. *Id.* The Court did not reach the question whether the terms used in the statute failed to prevent arbitrary enforcement by the jury. Thus the decision in *Pastrana* does not apply.

RCW 9A.32.030(1)(b) as applied to Mr. Caldellis's conduct was unconstitutionally vague. Therefore, this Court must reverse Mr. Caldellis's conviction for first degree murder.

4. THE ABSENCE OF ANY DEFINING STANDARD FOR EXTREME INDIFFERENCE DEPRIVED MR. CALDELLIS OF EQUAL PROTECTION

The Equal Protection Clauses of the United States and Washington Constitutions require that similarly situated person receive similar treatment. U.S. Const. Amend. XIV; Const. Art. I, §12; *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *In re Personal Restraint of Mota*, 114 Wn.2d 465, 473, 788 P.2d 538 (1990), *citing Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). If there is a disparity in the treatment of individuals accused of the same crime, the law requires that, at minimum, there must be a rational basis for such disparity. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305, 308-09, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) (law establishing reimbursement for indigent appeals irrationally discriminated between persons who were confined for offenses and those that were not).

Prosecutorial discretion to charge crimes and selective enforcement based on unjustifiable standards raises equal protection concerns. *United States v. Batchelder,* 442 U.S. 114, 125, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), *citing Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). *See also*

State v. Talley, 122 Wn.2d 192, 214, 858 P.2d 217 (1993); *State v. Lee,* 87 Wn.2d 932, 936, 558 P.2d 236 (1976) (also citing *Oyler*). Under the Washington constitution, equal protection is violated when two statutes declare the same acts to be crimes, but the penalty is more severe under one statute than the other. *State v. Leech,* 114 Wn.2d 700, 711, 790 P.2d 160 (1990).

While the vagueness doctrine controls juror discretion, equal protection controls prosecutorial discretion. As argued in § 3(b), *supra,* the term extreme indifference, and the unsuccessful attempts to define that term, fail to give sufficient guidance to jurors or prosecutors. As in the juror situation, one prosecutor may deem the actions of Mr. Caldellis as merely reckless and charge first degree manslaughter, while another prosecutor reviewing the same evidence may deem it extreme indifference and charge first degree murder based solely upon their unfettered discretion.

The inability to check the prosecutor's charging of first degree murder or first degree manslaughter based upon the same conduct violates equal protection. This Court must declare RCW 9A.32.030(1)(b) as applied to Mr. Caldellis unconstitutional and reverse his first degree murder conviction.

5. THERE WAS NOT SUFFICIENT EVIDENCE TO SUPPORT THE FIRST DEGREE MURDER CONVICTION

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Mr. Caldellis was charged with, and convicted of, first degree murder under RCW 9A.32.030(1)(b), which reads:

> (1) A person is guilty of murder in the first degree when:
> . . .
> (b) Under circumstances manifesting an extreme indifference to human life, he engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; . . .

State v. Anderson, 94 Wn.2d 176, 186, 616 P.2d 612 (1980).

Mr. Caldellis submits the State failed to prove that he acted with "extreme indifference to human life," and at best, the State proved that he acted only with reckless disregard, thus supporting a verdict of first degree manslaughter.

b. Mr. Caldellis could not be convicted of the extreme indifference prong of first degree murder as the State's theory was he specifically aimed at victims. Mr. Caldellis contends that the verdicts that he committed assaults against Ms. Lever and Mr. Defenbach when he fired the gun indicated he was targeting specific victims, thus negating his conviction for first degree murder.

One can be charged under RCW 9A.32.030(1)(b) when one acts with malice and disregard for human life in general. *Anderson*, 94 Wn.2d at 189. But, "where the act causing a person's death was specifically aimed at and inflicted upon that particular person and none other, the perpetrator of the act cannot properly be convicted of murder in the first degree under sub[section (b)] . . . ." *Anderson*,

94 Wn.2d at 186 (subsection (b) not applicable where defendant immersed two-year-old stepdaughter in tub of scalding water causing death); *State v. Berge*, 25 Wn.App. 433, 607 P.2d 1247 (in general, defendant who shot sleeping victim did not exhibit manifest indifference to human life), *review denied*, 94 Wn.2d 1016 (1980).

Here according to the State's theory, while Mr. Caldellis did not specifically target Mr. Clements, the second degree assault convictions proved that Mr. Caldellis was targeting Mr. Lever and Mr. Defenbach, and in the process, accidentally shot Mr. Clements. Under *Anderson*, since Mr. Caldellis was targeting a specific individual, he could not be convicted of murder under the extreme indifference prong, which was the only alternative means of first degree murder under which the State sought a conviction.

Reversal is required where the evidence shows that the defendant's conduct was dangerous to the life of a single victim. *See State v. Pettus*, 89 Wn.App. 688, 694, 951 P.2d 284 (reversal is required where the evidence shows that the defendant's conduct was dangerous to the life of a single victim), *review denied*, 136 Wn.2d 1010 (1998). In light of the convictions for assault of specific victims, Mr. Caldellis's conviction for first degree murder cannot stand.

c. The evidence showed Mr. Caldellis acted only with reckless disregard not extreme indifference. There are few published decisions addressing this alternative means of first degree murder and these cases provide some guidance in reviewing Mr. Caldellis's conviction.

In *State v. Guzman,* 98 Wn.App. 638, 990 P.2d 464 (1999), *review denied,* 140 Wn.2d 1023 (2000), the defendant was convicted as an accomplice of first degree murder under the extreme indifference prong in a drive-by shooting. Mr. Guzman was the driver of a car in which the front seat passenger fired a rifle as part of an on-going altercation several times at a group of men, hitting three people and killing one. *Guzman,* 98 Wn.App. at 641. The appellate court affirmed Mr. Guzman's conviction, noting:

> Mr. Guzman leaned out the passenger window and shouted, "Do you want to play with guns?" Immediately thereafter, Mr. Madera pulled a rifle from the trunk and slipped it into the front passenger seat with it in plain view of Mr. Guzman as Mr. Guzman moved to the driver's seat. The rifle was clearly visible to Mr. Valencia in the back seat, and from this the jury could infer Mr. Guzman saw the rifle as well. Mr. Guzman drove back to the scene. Mr. Madera turned around backwards in the passenger seat, held the rifle out the window and began shooting. Mr. Guzman then sped away, aiding Mr. Madera's escape and accomplishing his own. Considering this evidence in a light most favorable to the State, a jury could reasonably find that Mr. Guzman knew what Mr.

> Madera was doing, encouraged him, and aided him with indifference to the consequences.

Guzman, 908 Wn.App. at 646-47.

In *State v. Pastrana,* believing he had been run of the road intentionally by another driver while on the freeway, Mr. Pastrana retrieved a firearm, caught up to the offending driver and fired one shot out the window at the offending car, killing the passenger. 94 Wn.App. 463, 468-69, 972 P.2d 557, *review denied,* 138 Wn.2d 1007 (1999). Again the appellate court affirmed the conviction for first degree murder under the extreme indifference prong, finding that Mr. Pastrana, by shooting out of a moving car, not only endangered the lives of the three people inside the other car, but others who were in the vicinity. *Id.* at 473.

The Court of Appeals also affirmed a conviction under the extreme indifference prong in *State v. Barstad,* another case of road rage but one in which the driver was extremely intoxicated, Mr. Barstad drove through a red light at an intersection at an unsafe speed, struck two cars, became airborne, and landed on a third car killing the passenger. 93 Wn.App. 553, 556-59, 970 P.2d 324 (1999).

Finally, in *Pettus, supra,* Mr. Pettus, believing he had been defrauded during a drug purchase, obtained a gun and fired from his car into the drug dealer's car, killing the drug dealer. 89 Wn.App. at 691-92. The shooting took place at noon in a residential neighborhood and near a school where children were playing in the playground. *Id.* at 692. Mr. Pettus was convicted of the alternative means of first degree murder of premeditation and extreme indifference. *Id.* at 693 Testifying at trial, Mr. Pettus admitted he was a poor shot and had put people in the vicinity of the shooting at risk. *Id.* In affirming Mr. Pettus's first degree murder extreme indifference conviction, the appellate court ruled:

> Pettus fired a gun from a moving car numerous times while traveling through a residential neighborhood and near a school. These gunshots placed people in the vicinity at grave risk of death.

Pettus, 89 Wn.App. at 695.

What is gleaned from these cases is a conviction for first degree murder under the extreme indifference prong requires something more than the mere act of shooting the gun. These cases require a mental state such as blind anger or the desire for retribution *in addition to* the act of shooting. *Pastrana* involved a case of road rage, *Guzman* blind anger as part of a continuing and

escalating altercation, *Barstad* road rage and extreme intoxication, and *Pettus* anger and a desire for retribution for being cheated during a drug deal. This analysis is consistent with the Washington Supreme Court's analysis of first degree murder under the extreme indifference alternative means. *State v. Dunbar,* 117 Wn.2d 587, 817 P.2d 1360 (1991). The *Dunbar* Court determined that

> first degree murder by creation of a grave risk of death (now amended to extreme indifference) requires more than ordinary recklessness . . . we interpret RCW 9A.32.030(1)(b) to require an aggravated or extreme form of recklessness which sets the crime apart from first degree manslaughter.

Dunbar, 117 Wn.2d at 594. Thus, the mere act of shooting cannot be the basis for a conviction under this prong; something further is required.

Contrast the extreme indifference in these reported cases with reckless conduct required for a conviction for first degree manslaughter. A person is guilty of first degree manslaughter if he "recklessly causes the death of another person." RCW 9A.32.060(1)(a). A person acts recklessly "when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." RCW

9A.08.010(1)(c). The inference needed to support a first degree manslaughter instruction is that the defendant caused the victim's death *"without intent to kill, but with recklessness." State v. Bergeson,* 64 Wn.App. 366, 373, 824 P.2d 515 (1992) (italics in original). Manslaughter may be committed in sudden excitement without thinking of the effect of the act. *State v. Dolan*, 17 Wash. 499, 506, 50 P. 472 (1897).

In the case at bar, Mr. Caldellis did not act out of anger or revenge but acted in a manner designed to protect himself and his friends from danger. Although the shooting did occur in a neighborhood, unlike *Pettus,* the shooting did not occur during daylight hours when other neighbors might have been around. Mr. Caldellis was not acting out of anger, and in fact, had acted as a peacemeaker when earlier in the evening he had taken the gun from a friend to prevent another friend from using it during an argument. Further, Mr. Caldellis was not a participant in the fight, but came merely as a bystander, standing a safe distance away. Finally, the evidence established Mr. Caldellis committed the act out of sudden excitement without thinking of the consequences of his actions. Mr. Caldellis's actions, while admittedly reckless, failed to rise to the level of extreme indifference to human life as defined

in *Guzman, Pastrana,* and *Pettus.* Mr. Caldellis acted in the sudden excitement of the moment without thinking of the effect of the act, which does not constitute murder but rather, manslaughter. *Dolan*, 17 Wash. at 506. This Court must reverse the first degree murder conviction.

d. Mr. Caldellis was guilty of manslaughter as the evidence showed he only acted recklessly or negligently. A defendant may generally be convicted of only those crimes charged in the information. *State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997); *State v. DeRosia*, 124 Wn.App. 138, 150, 100 P.3d 331 (2004). The two recognized exceptions to this rule are lesser included offenses and crimes of an inferior degree. *In re the Personal Restraint of Thompson*, 141 Wn.2d 712, 722, 10 P.3d 380 (2000); *DeRosia*, 124 Wn.App. at 151.

A successful challenge to the sufficiency of the evidence generally warrants a reversal of the criminal conviction with an order to dismiss the prosecution. *State v. Smith*, 155 Wn.2d 496, 504-05, 120 P.3d 559 (2005). However, under certain circumstances, the court may remand the case with instructions to sentence a defendant for a lesser included offense or an inferior degree offense where "'the jury necessarily found each element of

the lesser included [or inferior degree] offense beyond a reasonable doubt in reaching its verdict on the crime charged.'" *State v. Hughes*, 118 Wn.App. 713, 731, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039, 95 P.3d 758 (2004), *quoting State v. Gamble*, 118 Wn.App. 332, 336, 72 P.3d 1139 (2003), *aff'd in part, rev'd in part on other grounds*, 154 Wn.2d 457, 114 P.3d 646 (2005).

Manslaughter is a lesser included offense of first degree murder by extreme indifference. *Pastrana*, 94 Wn.App. at 470; *Pettus,* 89 Wn.App. at 700. A person is guilty of manslaughter in the first degree when he or she recklessly causes the death of another person. RCW 9A.32.060 (1)(a). Alternatively, a person is guilty of manslaughter in the second degree "when, with criminal negligence, he causes the death of another person." RCW 9A.32.070 (1). A person acts with criminal negligence "when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(d).

As argued *supra,* the evidence established that Mr. Caldellis's conduct in shooting the gun was either reckless or

negligent. The jury was instructed on first and second degree manslaughter as a lesser included offenses of first degree murder. CP 86-90. Thus, given the fact the jury was instructed on these lesser included offenses, this Court must reverse Mr. Caldellis's conviction for first degree murder and may remand for entry of a conviction for first degree or second degree manslaughter.

6. THERE WAS INSUFFICIENT EVIDENCE THAT MR. CALDELLIS COMMITTED SECOND DEGREE ASSAULT

a. Assault requires a specific intent to create reasonable fear and apprehension of harm to the victim. Assault in the second degree is defined by statute as follows, in pertinent part:

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
> . . .
> (c) Assaults another with a deadly weapon;

RCW 9A.36.021(1).

"Assault" is not defined in the statute, thus courts must resort to the common law for definitions. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 504, 125 P.2d 681 (1942); *State v. Krup*, 36 Wn.App. 454, 457, 676 P.2d 507, *review denied*, 101 Wn.2d 1008 (1984). See also RCW 9A.04.060 (common law provisions supplement criminal statutes). Washington recognizes three ways

of committing an assault: (1) by actual battery; (2) by attempting to inflict bodily injury on another while having the present ability to inflict the injury; or (3) by placing the victim in reasonable apprehension of bodily harm. *State v. Byrd,* 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). Here the State pursued only the last of the three prongs of assault: that Mr. Caldellis placed the victims in reasonable apprehension of bodily harm.

Assault by attempt to cause fear and apprehension of injury requires *specific intent* to create reasonable fear and apprehension of bodily injury. *State v. Eastmond,* 129 Wn.2d 497, 500, 919 P.2d 577 (1996); *Byrd*, 125 Wn.2d at 713. Under this definition, the State was required to prove Mr. Caldellis acted with an *intent* to create in his or her victim's mind a reasonable apprehension of harm. *Byrd*, 125 Wn.2d at 713; *State v. Austin*, 59 Wn.App. 186, 192-93, 796 P.2d 746 (1990); *Krup,* 36 Wn.App. at 458-59. In addition, the victim's apprehension of harm must be reasonable. *Byrd*, 125 Wn.2d at 712-13.

Specific intent is the intent “to produce a specific result, as opposed to an intent to do the physical act” that produces the result. *State v. Davis*, 64 Wn. App. 511, 515, 827 P.2d 298 (1992), *rev'd on other grounds,* 121 Wn.2d 1, 846 P.2d 527 (1993).

Specific intent "can be inferred as a logical probability from all the facts and circumstances" of a case. *State v. Wilson,* 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

b. The State failed to prove Mr. Caldellis had the specific intent to create reasonable fear and apprehension of harm in Mr. Defendach and Ms. Lever. Mr. Caldellis contended he fired the gun in order to disperse the crowd and protect himself and his friends from the crowd of people who attacked them once they got out of their cars. Since the evidence failed to establish Mr. Caldellis had the specific intent to cause fear and apprehension of harm in these two people, or that either victim had a reasonable fear and apprehension of harm, Mr. Caldellis submits his convictions for the two counts of second degree assault cannot stand.

The two counts involved Megan Lever and Jeffrey Defenbach. Ms. Lever testified she did not fear risk of death or bodily harm from the first two shots in the air, and had no reason to believe that the remaining two shots either were or were not fired at her. RP 1000-01. Thus Ms. Lever's own testimony failed to support a guilty finding since her testimony plainly showed she had no reasonable fear or apprehension of harm.

Mr. Defenbach testified he went outside with Dustin Black to help break up the fight when he immediately heard a shot and saw a flash out of the corner of his eye. RP 1036-37. According to Mr. Defenbach, this shot was aimed into the air. RP 1049. Mr. Defenbach saw another flash, turned to run, and heard another shot. RP 1038-40. In all, Mr. Defenbach heard four shots but did not see the direction in which any of these shots were fired. RP 1040, 1052. At best, Mr. Defenbach testified he felt the shots were aimed in his general direction. RP 1053. Defenbach's "feeling" that the shots were aimed at him were simply not reasonable and does not rise to the level that supports a conviction for assault.

Further, the State failed to prove that Mr. Caldellis intended to target these two individuals. Assault under the reasonable apprehension prong requires a specific intent to cause reasonable fear or apprehension of harm in a particular victim. *Byrd*, 125 Wn.2d at 713. Mr. Caldellis's statement to the police was that he shot the gun into the air and then into the crowd of people but was not pointing it at any specific person. Ex. 167 at 21. Since this was the only evidence presented of Mr. Caldellis's intent when he fired the handgun, it does not support a finding that he had a specific intent to cause a reasonable fear or apprehension of harm in either

Ms. Lever or Mr. Defenbach. As a result, the two convictions for second degree assault were not supported by substantial evidence.

c. This Court must reverse and remand with instructions to dismiss the convictions. Since there was insufficient evidence to support Mr. Caldellis's convictions on Count III and IV, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States,* 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

7. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT BY MISSTATING THE LAW OF ASSAULT

During his rebuttal portion of the closing argument, in discussing the testimony of Mr. Defenbach and Ms. Lever and responding to the defense argument that shots in the air do not constitute assault in the second degree, the prosecutor contended:

> With respect to Second Degree Assault, absolutely shots in the air couldn't do it. The measure of how far

> is too far and how is it that everybody in the neighborhood wasn't a victim is it has to be reasonable apprehension of fear and injury or harm. So if it is unreasonable under the circumstances for a person to think that they were in danger, then they are not assaulted. But absolutely the shots in the air make it. Even better, the level shots or horizontal shots, so that doesn't matter so much, and that's exactly what the witnesses testified that they thought they were being shot at.
>
> The big difference is if it's a first degree charge in terms of fear of being injured. Yeah, the question and the evidence at the time was did you think the shots in the air could injury [sic] you? No. But second degree, it's just not an issue.

RP 3283-84. The defense immediately objected, noting:

> I don't think it's legally possible shots in the air to be an Assault in the Second Degree, and I would ask the jury be instructed to disregard that portion of the argument.

RP 3284. The court overruled the objection, ruling the jury had been instructed on the offense of second degree assault. RP 3284.

Mr. Caldellis subsequently moved for a new trial, noting, among other things, that the prosecutor committed misconduct in arguing that gunshots in the air alone constituted second degree assault. CP 68-71. The trial court denied the motion on this ground, ruling that the prosecutor's argument was proper. 1/9/08RP 50-51.

a. A prosecutor must not act in a manner designed to undercut the defendant's right to a fair trial. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was

harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 , *cert. denied*, 518 U.S. 1026 (1996). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." *Id.*

b. <u>The prosecutor misstated the law regarding assault during closing arguments</u>. "Statements by the prosecution or defense to the jury upon the law, must be confined to the law as set forth in the instructions given by the court." *Davenport,* 100 Wn.2d at 760. Prosecutors may comment on facts in evidence or reasonable inferences therefrom, however, prosecutors commit serious misconduct when they misstate the applicable law during closing argument. *State v. Fleming,* 83 Wn.App. 209, 213, 921 P.2d 1076 (1996).

As argued *supra,* assault by creating a reasonable apprehension of fear requires a specific intent to create in the victim's mind a reasonable apprehension of harm. *Byrd*, 125 Wn.2d at 713. Thus, Mr. Caldellis's act of shooting in the air was insufficient alone to constitute assault. The State was required to prove the additional element of Mr. Caldellis's intent to create the apprehension of harm. As a consequence, the prosecutor misstated the law of assault during his argument.

c. The prosecutor's misconduct likely affected the jury's verdict, requiring reversal of Mr. Caldellis's convictions for assault. Prosecutorial misconduct requires reversal unless the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 729, 899 P.2d 1294 (1995). The State cannot meet this standard by speculating that a hypothetical reasonable juror who did not hear the improper argument could have reached the same verdict, but rather must prove this specific jury would have reached the same verdict**.** *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

Here the State cannot meet this burden. As argued, Ms. Lever and Mr. Defenbach merely thought Mr. Caldellis was shooting at them, a feeling not supported by their testimony and thus, not reasonable. More importantly, the State failed to prove that Mr. Caldellis intended to scare or create fear of injury in these two people. The prosecutor's argument was designed to lessen the State's burden of proof and eliminate the requirement the State prove Mr. Caldellis's intent. As a consequence, the improper argument likely affected the jury's verdict on the assault counts. Mr. Caldellis was denied a fair trial on those counts and his convictions must be reversed.

E. CONCLUSION

For the reasons stated, Mr. Caldellis submits his convictions must be reversed either with instructions to dismiss or remand for a new trial.

DATED this 9th day of October 2008.

Respectfully submitted,

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